Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-94-7*

FACTS:

The Executive Office of Elder Affairs ("EOEA"), a state agency established pursuant to G.L. c. 19A, serves "to mobilize the human, physical and financial resources available to plan, develop and implement innovative programs to insure the dignity and independence of elderly persons, including the planning, development and implementation of a home care program for the elderly in the communities of the Commonwealth." Additionally, the EOEA must encourage and assist communities to develop and plan home care programs, which must be operated either by a state agency or any political subdivision of the Commonwealth or by nonprofit corporations organized under G.L. c. 180 and designated by the EOEA. Although c. 19A was passed in 1973, the statutory language which authorized home care programs to be operated by non-profit corporations was not added until 1985.

Councils on Aging ("COAs") are established by cities and towns pursuant to G.L. c. 40, §8B. COAs coordinate and carry out programs designed to meet the problems of the aging. COAs also receive grants from the EOEA to provide programs and services (such as congregate meals and transportation). Additionally, COAs utilize municipal funds and receive other grants to fund their programs and services.

In 1974, the EOEA decided to fulfill its statutory mandate through contracts with non-profit corporations (notwithstanding, as noted above, that explicit statutory authorization for designating non-profit corporations as home care corporations did not come about until 1985). Subsequent thereto, the EOEA developed extensive policies and procedures for managing a "Home Care Program" in the Commonwealth. The program was and continues to be funded with state appropriations (currently approximately $145 million), federal retained revenues and client copayments. The Home Care Program includes community services (home care, home health care and respite care) and protective services. The primary goal of the program is to maintain elder independence and dignity in a home setting. In 1974, the state was divided into 27 service regions. The EOEA established regulations concerning client eligibility as well as the manner in which services would be provided. The EOEA determined that it would contract with a non-profit corporation in each region and known as a Home Care Corporation ("HCC") to provide the services of the Home Care Program. The EOEA sought proposals from prospective service providers in each region. Contracts between the EOEA and 27 non-profit corporations were awarded. Some of the HCCs which were eventually awarded contracts had been in existence and were providing elder services prior to 1974. Other organizations were formed in response to the EOEA's requests for proposals.

Since 1974, the Home Care Program contracts have been the subject of a request for proposals on a periodic basis (now every 5 years). HCCs, as non-profit corporations, are managed by a board of directors and an executive director. Pursuant to G.L. c. 19A, §4(c), the majority of the governing board (board of directors) of any home care provider must be appointed by the COAs of the cities and towns serviced by the home care provider. In addition, a majority of the governing body of designated home care providers must be persons of sixty years of age or older who reside in the cities or towns served. In general, HCCs subcontract with other private organizations as well as with COAs for the majority of the services provided under the Home Care Program. There are, however, instances where a HCC, with the approval of the EOEA, will provide certain services through its own employees. Nevertheless, in most cases the HCCs serve to manage/monitor the delivery of services by their subcontractors. Finally, some HCCs provide a variety of elderly services in addition to those they provide pursuant to the Home Care Program. Such other programs are funded by various federal, municipal or private sources.

QUESTION:

May compensated employees of COAs serve as unpaid members of the board of directors for a HCC?

ANSWER:

Yes, subject to the limitations discussed herein.

DISCUSSION:

1. Jurisdiction

The Commission must first decide whether the non-profit HCCs should be considered public, as opposed to private, entities for purposes of applying the conflict of interest law.[1/] We conclude that HCCs are not public instrumentalities within the meaning of G.L. c. 268A.

We start by noting that an entity organized in a corporate form will not automatically be considered a private entity. Rather, the Commission has traditionally applied a four factor jurisdictional test to determine whether a particular entity should be considered public for purposes of applying the conflict of interest law to that entity's employees. Those factors are:

(1) the means by which the entity was created (e.g., legislative or administrative action);

(2) the entity's performance of some essentially governmental function;

(3) the extent of control and supervision of the entity exercised by government officials or agencies; and

(4) whether the entity receives or expends public funds. See *EC-COI-91-12; 89-24; 89-1*.

The Commission has on several occasions applied these factors to conclude that private non-profit corporations should be considered public instrumentalities. See *EC-COI-92-26; 91-12; 89-1; 88-24*.

Recently, the Massachusetts Supreme Judicial Court affirmed the Commission's jurisdictional test, stating:

> we believe that the test provides an appropriate starting point for determining whether an entity is an instrumentality [of the Commonwealth] for purposes of G.L. c. 268A. The test focuses on the method of formation, operation, and purpose of the entity, all factors which the Appeals Court recently noted to be central to the question of an entity's status as an "instrumentality" under the conflict of interest law. See *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992). *Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission*, 414 Mass. 582, 588 (1993). ("*MBTA*")

The Court went on to discuss an additional consideration utilized by the Internal Revenue Service ("IRS") when it decides whether an entity is a public instrumentality under the federal tax code: "whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner." See, Rev. Rul. 57-128, 1957-1 C.B. 311; *MBTA*, 414 Mass. at 589. With this opinion, we will for the first time take into account whether there are private interests involved in the entity being examined.

The application of our jurisdictional analysis to HCCs leads to the conclusion that HCCs are not public instrumentalities. First, after examining the history of HCCs and the means by which they were created, we do not find a statute, rule, regulation, or other direct EOEA action. We note that, in 1974, the EOEA made a determination that it would seek to provide home care services through contracts with non-profit corporations ("HCCs"). Pursuant thereto, the EOEA established qualifications and other criteria for serving as a HCC. However, it appears that the EOEA was not statutorily required or otherwise directed to establish HCCs, nor did the EOEA take affirmative steps to specifically create the non-profit corporations which were eventually awarded the contracts. See *EC-COI-88-19* (where there was no law, rule or direct agency action resulting in corporation's creation, mayor's involvement in selection of board of directors and executive director went to the composition of the non-profit organization rather than the impetus for its creation). In fact, until 1985, there was no explicit

statutory authorization for the EOEA's use of non-profit corporations to assist in providing home care services. Moreover, as we have noted, some HCCs existed prior to 1974. While it is clear that governmental action has in effect enhanced the market for these services, thereby causing HCCs to proliferate, it would not be accurate to say that HCCs were created by governmental action.

Turning to the second factor, we conclude that the HCCs do perform an essentially governmental function. While we recognize that the provision of home care services to the elderly can be either publicly or privately performed, we have previously concluded that an entity performs a governmental function where the function is contemplated by state or federal legislation. See *EC-COI-88-19.* Here, the EOEA is statutorily obligated to implement home care programs in the Commonwealth. The EOEA's enabling statute permits the provision of such home care services by non-profit corporations designated by the EOEA. Absent implementation by HCCs, a state agency or other political subdivision of the Commonwealth must operate home care programs for the elderly. The fact that the Home Care Program is currently being carried out by a non-profit corporation does not change the nature of the function from public to private. See *EC-COI-84-147* (private, non-profit corporation performing a portion of duties which public entity is statutorily required to perform is serving a governmental function); *89-24* (non-profit corporation which furthers UMass' legislatively mandated function of education and research performs governmental function). We therefore conclude that the HCCs carry out an obligation statutorily imposed on the EOEA and therefore perform an essentially governmental function.

Considering the third factor, we do not find governmental control of the HCCs in a manner contemplated by our jurisdictional test. We note that the EOEA exercises substantial control and supervision (in the common sense meaning) over the functioning of the HCCs. For example, by regulation, 651 CMR 2.00 et seq., the EOEA sets policy, issues program regulations and guidelines, approves HCC budgets, conducts audits, sets out reporting requirements and training and generally manages many aspects of the day-to-day operations of the Home Care Program. In addition, pursuant to 651 CMR 3.02, the EOEA is required, among other things, to provide ongoing monitoring, assessment and evaluation of the activities and operation of HCCs. However, the Commission has not traditionally looked at governmental regulation of an entity as evidence of governmental control. Rather, we have previously considered governmental participation in the selection of a corporation's board of directors or the presence of a majority of board members appointed by a governmental agency as an indicator of governmental control for purposes of our jurisdictional test. See *EC-COI-91-12; 90-3.* In each of these cases, however, the entity under consideration was created by the actions of government officials, who then controlled the selection process and composition of the entity's governing body. See, e.g., *EC-COI-84-147; 89-1, 91-12* (each involving holding companies created by resolution of the Board of Trustees of a state institution); *89-24* (non-profit corporation created by actions of state officials); *90-3* (same). Here, by contrast, HCCs were not first created and then controlled by the government.

Additionally, we note that the Court in *MBTA* looked beyond the mere appointment of each board member and considered to whom the board members owe their loyalty. Where the Retirement Board members owed their primary loyalty to the members and beneficiaries of the retirement fund and not to the MBTA, the Court did not find that the MBTA exercised the requisite control or supervision over that board, notwithstanding the MBTA's appointment of a portion of the Board members.

In the case before us, we note that, pursuant to statute, a majority of the board members of a HCC must be appointed by the local COAs served by the HCC. In addition, a majority of the board members must be 60 years or older and must reside in the communities served by that HCC. As a result of these two statutory requirements, it appears that the principal legislative goal was to provide HCCs with directors who could advise on behalf of, and otherwise represent, the population most directly affected by the services provided by the HCCs. In any event, because the EOEA does not have appointing authority over any of a HCC's board members, and because it does not appear to us that the HCC board members owe their primary loyalty to the EOEA, we do not find that the EOEA exercises the requisite control for purposes of our jurisdictional test. See, e.g., *EC-COI-84-65* (finding a lack of municipal government control over public charitable trust whose trustees were city officials, because "the three city officials acting in their trustee capacities owe a duty of loyalty to the Fund").

As for the fourth factor, HCCs receive considerable funding from the state by virtue of their Home Care Program contracts with the EOEA. We have previously held that state funds paid pursuant to a vendor contract would not alone indicate state agency status where an entity received the majority of its funding from the federal government. See *EC-COI-85-78.* See also *MBTA* at 582 (funds paid by state agency in which Commonwealth

has no continuing proprietary interest become private in nature once they are paid out by the Commonwealth).[2/] Here, by contrast, where the Home Care Program services being provided by the HCCs are statutorily mandated and where the state continues to have an interest in how its program funding is expended, we find that the HCCs receive and expend public funds in the manner contemplated by our jurisdictional test.

As suggested by the Court in *MBTA*, we will also take into consideration, when relevant, "whether there are any private interests involved, or whether the states or political subdivisions have the powers and interests of an owner" in examining entities, such as the HCCs, for jurisdictional purposes. *MBTA*, 414 Mass at 589. As noted above, this jurisdictional consideration is derived from the test used by the IRS when it considers whether an entity is an instrumentality or political subdivision of the state for federal taxation purposes, specifically the Federal Insurance Contributions Act, 26 U.S.C. 3121(b)(7) and the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(7). The IRS examines whether there are any non-public proprietary interests involved in the particular entity being examined. For example, in Rev. Rul. 57-128, 1957-1 C.B. 311, 312, the IRS determined that a voluntary unincorporated organization formed by state insurance officials to promote uniformity in legislation affecting insurance, to encourage departmental rulings under the insurance laws of several states, to disseminate information to insurance supervisory officials, and to protect the interests of insurance policyholders in various states, was a part of the "state government machinery for the administration of the insurance laws of the respective states." The IRS decided that the association was a state instrumentality, in part, because

> No proprietary interest in the association exists other than those of the states themselves, which through the membership of their officers have the powers and interests of an owner. The states, through their officers, have the right collectively to dispose of the assets of the association. Therefore it follows that the association is an instrumentality wholly owned by the states. Rev. Rul. 57-128 1957-1 C.B. 31.2

Similarly, in Rev. Rul. 65-196 1965-2 C.B. 389, the IRS examined the existence (or lack of) private interests in a "Sports Area Commission" organized by a city and two villages. The IRS concluded that because all physical properties and other assets of the commission were held and owned by the participating municipalities, and because one of the municipalities was responsible for the project's finances (as opposed to private financing), there were no private interests involved and the commission was "an instrumentality wholly owned by one or more political subdivisions of the state." See also, *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 918 (1987) (finding that Long Island Railroad satisfies the IRS criterion concerning public ownership interest as opposed to private interests where governmental entity, the Metropolitan Transit Authority, wholly owns the entity in question).

In contrast, the IRS determined that a soil and water conservation district was not an instrumentality of the state or any of its political subdivisions. Rev. Rul. 69-453 1969-2 C.B. 183. There, the district began as an unincorporated association of landowners. Later, it was incorporated with the stated purposes of making surveys and investigations and doing research concerning problems of soil erosion, to cooperate with or enter into agreements with landowners, to develop conservation practices and to assist community conservation commissions and provide soil maps for planning and zoning boards. The district's relationship to the government was by virtue of a memorandum of understanding between the district and the state Commissioner of Agriculture in which both agreed to undertake various tasks in cooperation with each other. In examining the district in light of its test, the IRS based its decision that the district was not a public instrumentality, in part on the fact that the district, a private non-stock corporation, primarily acted on behalf of private individuals in accordance with the purposes stated in its certificate of incorporation. The IRS found that any benefits conferred upon the public were incidental to the district's primary purpose.

Considering the facts before us, we find that HCCs, which are privately created, involve significant private proprietary interests in addition to any interests of the Commonwealth or its subdivisions. For example, it appears that neither the EOEA nor the Commonwealth has the right of ownership with regard to the entire inventory of a HCC's physical property. The EOEA, while having the ability to approve of the budget of a HCC and to conduct audits with regard to the services provided to the EOEA pursuant to its contract, does not have the ability generally to control and dispose of the assets of HCCs. Thus, we conclude that the Commonwealth does not act as an owner of the HCCs, where a key element of ownership is the unfettered ability to control and dispose of that which is owned.

In summary, we recognize (a) that the HCCs' provision of home care services to the elderly has been an

essentially governmental function since 1974, (b) that HCCs do receive considerable state funding pursuant to the Home Care Program, and (c) that the Commonwealth has a continuing interest in the expenditure of those funds. Nevertheless, we believe that these factors are outweighed by the fact that HCCs were not created pursuant to statute, regulation or other direct action by the EOEA, and that the EOEA does not exercise the requisite control over HCCs, where HCC board members do not owe their primary loyalty to the EOEA. These latter considerations best support a finding that, notwithstanding extensive regulation of HCCs, HCCs should not be deemed to be instrumentalities of the Commonwealth. Rather, we conclude that HCCs are private entities due to the significant private interests at play in the creation and functioning of the HCCs as non-profit corporations. As a result of the foregoing conclusion, a member of the board of directors of a HCC is not a public employee by virtue of that position.

We will now apply G.L. c. 268A to those employees of the local COAs, municipal agencies for purposes of the conflict of interest law, who seek to be appointed to positions on the board of directors of a HCC.

2. Application of the Conflict of Interest Law.

Section 17 prohibits a municipal employee from acting as an attorney or agent or from receiving compensation from anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest. Under §17(c) therefore, a municipal employee (by virtue of his employment with a COA), will be prohibited from acting as an agent[3/] for the HCC which he serves as a director in connection with matters in which his municipality has a direct and substantial interest.[4/] For example, such a COA employee could not serve as the agent of a HCC in negotiating a subcontract for the provision of certain home care services by the COA. We note that acting as an agent includes appearing before the COA or other municipal agencies in a representational capacity, as well as signing off on documents which will be submitted to the COA or another municipal agency. See *EC-COI-92-18, 85-58; 84-6; 83-78.*

Section 19, in relevant part, prohibits a municipal employee from participating in a particular matter in which a business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest. For purposes of §19, the financial interest may be of any magnitude and may be of a positive or negative fashion. Under this section, a COA employee who also serves as a director of a HCC will be prohibited from participating as a COA employee in a matter in which the HCC with which he is affiliated has a financial interest. See e.g., *EC-COI-92-1* (municipal employee cannot vote or otherwise participate in municipal funding decisions affecting non-profit corporation/"community action agency" by which he is employed). We note that participation includes not only final decisions on matters, but discussion, debate, recommendations, advice, etc., which lead to a final decision.[5/]

Finally, §23(c) prohibits a public employee from disclosing confidential information to which he may have access as a public employee. For purposes of the prohibition, confidential information is information which is not available through a public records request. For example, under this section, a COA employee could not disclose to the board of the HCC which he is serving any confidential information to which he may have access as a result of his COA position.

DATE AUTHORIZED: June 7, 1994

* Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

1/ In G.L. c. 268A, §1(p), "state agency" is defined as any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

2/ The Court in *MBTA* gives as an example public funds paid to a private health care provider to provide services to public employees. Such payments of public funds are a contractually determined form of employee compensation. Therefore, unlike the case at hand, upon payment, the Commonwealth arguably exercises no continuing interest in the health care provider's expenditure of those funds.

3/ HCC board members do not receive compensation and therefore §17(a) is not relevant based on the facts presented.

4/ We note that §17 will apply somewhat less restrictively if the municipal employment position in the COA has been designated by the municipality's board of selectmen or city council as a special municipal employee position. See G.L. c. 268A, §1(n).

[5/] We note that §19 provides that a municipal employee may participate in a matter, notwithstanding the prohibition of that section, if the employee has first made a written disclosure to his appointing authority of the financial interest of the business organization with which he is affiliated, and if the appointing authority makes a written determination that the financial interest involved is not so substantial as to be likely to affect the integrity of the services being provided by the employee to the municipality.